PACIFIC POWER AND LIGHT CO.

IBLA 80-508 Decided June 23, 1982

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, imposing increased rental charges for use and occupancy of rights-of-way W-36609, W-39400, and W-62224.

Affirmed.

1. Appraisals -- Federal Land Policy and Management Act of 1976: Rights-of-Way

Appraisals of rights-of-way for industrial pond sites will be upheld where there is no error in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the comparable sales data used by BLM was invalid or that the charges derived are excessive.

APPEARANCES: Gail L. Achterman, Esq., Portland, Oregon, for appellant;
Marla E. Mansfield, Esq., Office of the Solicitor, Denver, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Pacific Power and Light Company appeals from a decision dated February 29, 1980, by the Wyoming State Office, Bureau of Land Management (BLM), requiring appellant to submit increased rental payments for rights-of-way W-36609, W-39400, and W-62224.

Appellant operates the Jim Bridger coal-fired electric power plant in Sweetwater County, Wyoming. In 1973 appellant leased from BLM a 174.10 [plus or minus] acre parcel (W-36609) for use as a surge pond. Also, in 1973 appellant leased from BLM a 400.10 [plus or minus] acre parcel on which to place an evaporation pond. In 1978 appellant leased a 30.18 [plus or minus] acre parcel for use as a scrubber effluent pond. 1/

1/ The legal descriptions of these lands are as follows:
"W-36609
T. 20 N., R. 101 W., 6th P.M. section 10, All those lands lying below contour elevation 6,686 including a strip 50 feet in width measured horizontally, containing 174.1 [plus or minus] acres.

When BLM advised appellant that it proposed to increase the annual rentals on the three parcels, appellant protested the increases and requested a hearing. A hearing was subsequently held on November 19, 1979, at BLM's Wyoming State Office. Both parties presented appraisals and the testimony of appraisers. BLM's appraiser (Robert B. Leonard) estimated a fair market value (FMV) of $423,066 for all three parcels (604.38 acres). He calculated a fair market annual rental value at $36,170 (BLM Exh. A at 21). 2/ Appellant's appraiser estimated the value of the lands at $92,000, and the fair market annual rental value at $7,988.75 (Appellant's Exh. A at 22, 25).

The decision appealed from implements the $36,170 annual rental fee established by the BLM appraisal.

The great difference in valuation between the two appraisals is due to the fact that BLM's appraiser considered the highest and best use of the lands to be "agricultural" with "strong industrial development potential" (BLM Exh. A at 11), whereas appellant's appraiser found the highest and best use to be for "rural homesites but more likely stockgrazing" (Appellant's Exh. A at 14). As appellant's appraiser indicated at the hearing, if he "thought that an industrial use was the most likely" his evaluation would not differ significantly from BLM's (Tr. 15).

BLM's conclusion as to highest and best use flows from the following analysis:

> The lands containing the Jim Bridger Power Plant and Coal Company are legally zoned for industrial use and mineral development effective in June 1972. This constitutes the present zoning. In addition, the present site was selected for the power plant location primarily because of its peculiarly favorable physical amenities adaptable for industrial use development. These included: (a) proximity factor in being close to coal deposits,

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fn. 1 (continued)
"W-39400
T. 21 N., R. 101 W., 6th P.M.
sections 26 and 36, Those lands lying below contour elevation 6,670 including a 50 foot horizontal buffer, containing 400.1 [plus or minus] acres.
"W-62224
T. 21 N., R. 101 W., 6th P.M.
sections 26 and 36, Those lands lying below the 6,694 foot elevation contour including a 50 foot horizontal buffer containing 30.18 [plus or minus] acres."
(BLM Exh. A at 9).

2/ BLM also submitted an "abbreviated" appraisal by Dean Fosher who did not testify at the hearing. Since it was unnecessary to rely on the Fosher appraisal in adjudicating the case, appellant's challenges thereto are not discussed herein. All references to BLM appraisal are to the appraisal prepared by Robert B. Leonard (Exh. A).

Union Pacific Railroad, and Interstate 80 and major highway transportation routes, (b) availability of water and power to this particular location and area, (c) industrially favorable topography and climatic factors, (d) nearness to the small community of Point of Rocks, situated about six miles southerly of the plant, which provides some housing and shopping facilities for plant personnel. Therefore, these supporting elements establish that industrial use in the Bridger Power Plant ownership, both present and potential, are found to be physically possible, financially feasible, adequately and appropriately supported, and results in the greatest net return to the land in terms of income and land value.

On March 2, 1979, a meeting was held with Mr. Sam L. Campagna, Project Manager for the Jim Bridger Project at the Rock Springs District Office, BLM. The Appraiser discussed the highest and best use of the subject power plant lands as well as land purchases made by Pacific Power and Light and Idaho Power and Light Companies jointly over past years for use in connection with plant operations.

Mr. Campagna stated that he felt the highest and best use of the underlying lands in the subject ownership was industrial. * * * This is because of the above discussed physical amenities and criteria possessed by the site exclusive of County zoning to industrial use. After completion of the fourth unit to the plant there are no further plans for expansion at this time. However, he indicated that there was a strong possibility of industrial development of private and public lands north and east of the plant. This is due to Rocky Mountain Energy Company's promotion of this area to other outside firms for utilization of the large coal desposits that exist there. It was felt that an acceleration of the boom that is presently taking place in Sweetwater County and this general area would occur due to the energy thrust in the nation and the abundant deposits of minerals present. That industrial accent toward utilization of the natural resources of gas, oil, and coal as well as increased demand for electric power by high users is in the initial stage. Lands in the area similar to the subject possessing industrial potential have been undergoing transition from agricultural use for some years.

Value in use is the value of a property to a specific owner having little or no use utility to the general market (subjective value versus objective value). The lands in the ponds are presently placed to a special use, however, being located in an industrial zoned area, these lands generate a market demand for other potential industrial buyers entering the area for the same or allied uses. These lands contain the natural physical elements compatible with industrial development.

(BLM Exh. A at 10-11).

BLM's appraisal employed the "direct sales comparison approach" in evaluating the subject lands, and analyzed three such sales. Two of the comparable sales were of private lands adjoining the parcels at issue. Appellant purchased these parcels from Union Pacific Land Resources Corporation in 1975 and 1978 for $500 and $900 per acre, respectively. BLM's appraiser concluded from his investigation that the sales were "open market arms length transactions" (BLM Exh. A at 17). The third comparable sale involved a 160-acre industrial parcel northwest of Casper, Wyoming. It was sold for $96,000 or $600 per acre in June 1978. The facts of these three sales form the basis for BLM's valuation of the subject lands at $700 per acre. Appellant's appraiser, who did not include these sales in his appraisal, testified that the two sales between Union Pacific Land Resources Corporation and appellant were not open market transactions because no other purchaser "had a chance at the land" (Tr. 33). He agreed, however, that since Union Pacific, Rock Springs Grazing Association, and the United States (BLM) were the largest landowners in the area, exclusion of the two sales would not yield an accurate picture of the market (Tr. 52-54). Appellant's appraiser compiled his fair market evaluation using the data from grazing land and homesite sales in various Wyoming counties.

Appellant's major challenge to the BLM appraisal is that BLM impermissibly relied on improvements made by appellant to its adjoining property in determining a highest and best use for industrial purposes. Appellant alleges that the lands at issue are uniquely valuable only to itself and cites numerous cases standing for the proposition that such special value may not be included in appraising market value. Appellant emphatically argues that no reasonable probability has been shown that the lands would be put to industrial use by anyone other than itself.

Appellant places much reliance on United States v. 46,672.96 Acres of Land, 521 F.2d 13 (10th Cir. 1975), involving the Government's condemnation of land for the White Sands Missile Range. Appellant maintains that under the theory applied in this case, the prices it paid for the two parcels it acquired from Union Pacific Land Resources Corporation may not be used because they reflect the lands' unique utility to appellant and represent the prices a "monopolist" could extract from a captive purchaser. Appellant challenges the remaining comparable sale in the BLM appraisal on the ground that it involved a smaller parcel located near an interstate and in close proximity to an airport industrial area. Finally, appellant alleges that the BLM appraisal was improperly based on speculation. Appellant asks the Board to adopt its appraiser's figure of $150 per acre as represented for agricultural land in the area.

[1] The general standard for reviewing rights-of-way appraisals is to uphold the appraisals if there is no error in the appraisal methods used by BLM or the appellant fails to show by convincing evidence that the charges are excessive. Western Slope Gas Co., 61 IBLA 57 (1981); Northwestern Colorado Broadcasting Co., 49 IBLA 23 (1980); Full Circle, Inc., 35 IBLA 325 (1978); Four States Television, Inc., 32 IBLA 205 (1977). We find that appellant has not made the necessary showings. Responding to appellant's first argument, we must observe that while the BLM appraisal lists the amenities, improvements, and enhancements appurtenant to appellant's site, the

market value computation is unmistakably derived from the comparable sales data (BLM Exh. A at 17-21).

Appellant's site was long ago zoned for industrial use and the ponds, as adjuncts of the plant, are clearly an industrial use of the lands in question. The fact that the zoning makes the land available for further industrial use surely adds value. Moreover, the extent to which existing facilities make the lands reasonably suited for industrial development is properly considered in valuation. The conclusion of appellant's appraiser that highest and best use would be grazing with possible rural homesites 3/ ignores these considerations as well as the comparable sales data in BLM's appraisal.

The crucial issue, in any event, is not so much that of highest and best use as that of the value of the land. Viewed in perspective, highest and best use is merely a tool to determine what is, in fact, a comparable sale. Inasmuch as as two of BLM's three comparables were adjacent to the subject tracts, and it is not contended that the adjacent lands were in any way different from the land subject to the appraisal, the per acre value that they provide would seem to eliminate the need for any further analysis. We conclude that appellant's own valuation of the adjacent tracts is sufficiently compelling to set the value of the land at issue. Though appellant has strenously alleged that it was a victim of price gouging in the two sales from Union Pacific, no supporting data has been presented to bear out these allegations and the testimony to the contrary is unrefuted (see Tr. 79, 96, 99). United States v. 46,672.96 Acres of Land, supra, does not support appellant's position. The court there stated at 17:

> The general rule is that evidence of prices paid by the government for the purchase, through private negotiations, of lands in connection with the project for which land is being condemned cannot be received. Slattery Co. v. United States, 231 F.2d 37 (5th Cir. 1956); Evans v. United States, 326, F.2d 827 (8th Cir. 1964). Such payments are in the nature of compromise and are not, therefore, evidentiary on what constitutes fair market

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3/ In Full Circle, supra at 332, we noted that the Department had adopted the Uniform Appraisal Standards for Federal Land Acquisitions (1973). According to these standards highest and best use is defined as:

"[E]ither some existing use on the date of taking or one which the evidence shows was or reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions."

The Standards further state:

"Many things must be considered in determining the highest and best use of the property including: supply and demand; competitive properties; use conformity; size of the land and possible economic type and size of structures or improvements which may be placed thereon; zoning; building restrictions; neighborhood or vicinity trends."

Uniform Appraisal Standards for Federal Land Acquisitions at 7.

value. See Slattery Co., supra, at 41. There is an exception if the sales were voluntary. Transwestern Pipeline Co. v. O'Brien, 418 F.2d 15 (5th Cir. 1969).

Appellant has not shown that the two sales were involuntary or not the result of compromise. No record of negotiations was provided by appellant though such records should have been within its possession. If appellant wished to exclude the comparables, it would have had the burden of establishing that these sales were indeed forced. This it has not done.

We conclude that it would be inappropriate to consider the value of these lands for grazing in setting appellant's rental because the record clearly does not support this valuation, and the Government must charge fair market value. 4/ The fact that appellant has no direct competition for the sites is evidence which supports the direct sales comparison appraisal methods utilized by BLM. As the Board states in Northwest Colorado Broadcasting Co., supra at 27, "the rental charge should not be what appellant would like to pay or BLM would like to charge, but rather that rental which would be a fair amount on the open market for appellant to pay and BLM to receive." 5/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge E

dward W. Stuebing
Administrative Judge

4/ See section 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976); 43 CFR 2802.1-7(a).

5/ Appellant's suggestion that BLM's determination of fair market value is based on speculation is not worthy of a serious consideration. It is based upon an out of context generalization made at the hearing by BLM's chief appraiser. See colloquy at Tr. 159-61.